

# COMMERCE ACT 1986: AUTHORISATION OF RESTRICTIVE TRADE PRACTICES

## APPLICATION FOR AUTHORISATION (STREAMLINED PROCESS)

### Form for Notice under section 58 (Streamlined Process)

#### Introduction

- 1.1 Section 61 of the Commerce Act 1986 (the Act) provides that the Commerce Commission (the Commission) may grant authorisations for restrictive trade practices that may otherwise breach certain provisions of the Act, on application by a person or business involved in those practices. In general, the Commission is empowered to grant an authorisation for such practices if it is satisfied that the public benefit of the practices outweighs the detriment arising from the loss of competition.
- 1.2 A streamlined process has been developed to enable the Commission to make a decision on straightforward authorisation applications as quickly as possible, if the Commission considers that the practices:
  - are relatively straightforward;
  - have obvious public benefits; and,
  - will have a relatively limited impact on competition in the relevant market.
- 1.3 The [Streamlined Authorisation Guidelines](http://www.comcom.govt.nz/competition-resources) on the Commission's website under [www.comcom.govt.nz/competition-resources](http://www.comcom.govt.nz/competition-resources) sets out the criteria that make it more likely that the streamlined process would apply.
- 1.4 In most cases, the questions in the streamlined application form should not require complex responses or require the applicant to obtain or analyse quantitative data that is not readily available. The Commission will take the same general approach toward assessing the public benefits and detriments of a streamlined authorisation application as it would take towards a standard application, and in the same way, it must be satisfied that the public benefits outweigh any detriment arising from the loss of competition.
- 1.5 However, not all authorisation applications will be able to be dealt with under the streamlined process. The Commission recommends that anyone considering making an application under the streamlined authorisation process contact the Manager of the Mergers and Authorisations Team to discuss whether the streamlined process is appropriate for the practice in question.
- 1.6 If authorisation is given, then, in general terms, sections 27, 28, 37 and 38 of the Act do not apply to the proposed practices, while the authorisation remains in force (refer to s 58A of the Act).

## The Application Form

- 1.7 Section 109 of the Act empowers the Commission to prescribe the form for giving applications or notices required for the purposes of the Act. Attached is the application form to be used in applying for an Authorisation of Restrictive Trade Practices (Streamlined Process) under s 58.
- 1.8 If it is not possible to provide some of the information specified in the form, please provide brief reasons as to why the omission of that information would not affect the Commission's ability to determine the application. In addition, if the information requested is not relevant, please specify why such information is irrelevant for the purposes of the Commission's ability to determine the application.
- 1.9 Applicants are encouraged to provide any further information that may be outside the scope of the questions in the form if they consider it will assist the Commission's assessment of the proposed restrictive trade practices.
- 1.10 The notice should be sent to:

The Registrar  
Mergers and Authorisations  
Commerce Commission  
PO Box 2351  
WELLINGTON  
[registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz)

The application should be accompanied by payment of the prescribed fee, which is currently **\$36,800** (GST inclusive) for each application for authorisation. Payment can be made by cheque or electronic payment into the Commission's bank account. The Commission's bank account details are as follows:

Commerce Commission  
BNZ North End  
020536032986700 (please use the applicant's company name as the reference when depositing funds electronically. Any bank transaction fees are to be met by the applicant).

### WARNING

It is an offence to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission. Any person who does so is liable upon summary conviction to a fine of up to \$100,000 (for an individual) or \$300,000 (for a body corporate). Refer to sections 103(2) and (4) of the Act.

*This form was last updated in September 2017*

## COMMERCE ACT 1986: Application for Authorisation (Streamlined Process) for Restrictive Trade Practices

### PART 1: DETAILS OF APPLICANT AND OTHER PARTIES

- 1 Provide the name of the applicant, and the name and position of the individual responsible for the application. Please include the:
  - registered office address, postal address and physical address of the applicant;
  - telephone and fax numbers and website of the applicant; and
  - email address, telephone number and position of the contact person.
  
- 2 Provide the name of the other parties to the proposed restrictive trade practices (proposed practices) and the name/position of the individual to contact within the relevant parties. For each party, please include:
  - registered office address, postal address and physical address;
  - telephone and fax number and website; and
  - email address, telephone number and position of the contact person;
  
- 3 With respect to the parties, list the relevant companies and the person or persons controlling these directly or indirectly. The Commission only requires details of the persons interconnected to, or associated with, the merger parties to the extent that those interconnections or associations are relevant to the Commission's consideration of the competition implications of the proposed practices.

*For further information on interconnected persons and associated persons, please refer to Part 2 of the Mergers and Acquisitions Guidelines.*

- 4 Provide a full description of the proposed practices, including any document that details the terms of the practices.

### PART 2: THE INDUSTRY

- 7 Describe the relevant goods or services supplied by the parties that are relevant to the proposed practices.
  
- 8 Describe the industry or industries affected by the proposed practices. Where relevant, describe how sales are made, the supply chain(s) of any product(s) or service(s) involved, and the manufacturing process. If relevant, provide a glossary of terms and acronyms.
  
- 9 Describe the current industry trends and developments including the role of imports and exports, emerging technologies, and/or changes in supply and demand dynamics.
  
- 10 Please highlight any relevant mergers that have occurred in this industry over the past three years. Include any acquisition of assets of a business or shares which the parties

(or any interconnected or associated businesses) to the proposed practices have undertaken in the last three years.

- 11 Please provide any reports, surveys or published papers that provide information or analysis on the industry or the relevant markets, in so far as these are relevant to the state of competition existing in the affected markets, over the last five years.

### **PART 3: MARKET DEFINITION**

- 12 Please define the market(s) relevant to the proposed practices for the:
- 12.1 product(s) or service(s);
- 12.2 functional level;
- 12.3 geographic area; and
- 12.4 customer dimension and timeframe (if relevant).
- 13 Where relevant, please explain how products or services are differentiated within the market(s).

*For further information on market definition and differentiated products, please refer to Part 3 of the Mergers and Acquisitions Guidelines.*

### **PART 4: COUNTERFACTUAL**

- 14 In the event that the proposed practices **do not** take place, describe what is likely to happen to the market/industry and the business operations of the parties. Both benefits and detriments are measured against a counterfactual. The assessment involves a 'with' and 'without' comparison of the matter under consideration, rather than a 'before' and 'after' comparison.

*For further information on the counterfactual, please refer to Part 4 of the Mergers and Acquisitions Guidelines.*

### **PART 5: EXISTING COMPETITORS**

*Please answer questions 15 – 18, below in respect of each market identified in question 12 above.*

#### **Existing Competitors**

- 15 Identify all of the relevant competitors in the relevant market(s), including near competitors and importers in the market(s), and describe how they all compete in the market(s).

- 16 Outline the estimated market shares in terms of sales, and, where relevant, volume and productive capacity, of the parties and competitors identified above. Please include, where known:

16.1 the estimated total value of the domestic market; and

16.2 the source of the data provided.

*For further information on where it is relevant to consider volume and productive capacity as well as sales, please refer to section 5.2 of the Mergers and Acquisitions Guidelines.*

*Market share information may be illustrated by the use of the table below:*

<b>Rank</b>	<b>Competitors (including parties)</b>	<b>Estimated revenue</b>	<b>Estimated % of market share by revenue</b>	<b>Estimated volume</b>	<b>Estimated % of market share by volume</b>
<b>1</b>					
<b>2</b>					
<b>3</b>					
<b>4</b>					
<b>5</b>					
<b>6</b>					
<b>etc</b>					

#### **PART SIX: POTENTIAL COMPETITION**

- 17 Please provide details of significant new entry and exit which has occurred in the relevant markets in the past five years.
- 18 Please comment on the potential for new entry and/or expansion into the markets within the next two years, the time it is likely to take a new entrant to be in a position to provide effective competition, and the principal factors that may affect new entry.

#### **PART SEVEN: PUBLIC BENEFITS AND DETRIMENTS**

- 19 With reference to the Notes to this form (at Appendix 1), please provide evidence to support the public benefits you are claiming, both qualitatively and quantitatively.
- 20 With reference to the Notes to this form (at Appendix 1), please provide evidence of any detriments that may result from the proposed practices, both qualitatively and quantitatively.

## PART EIGHT: IDENTIFICATION OF INTERESTED PARTIES

- 21 Please provide the contact details of likely interested parties, such as customers and suppliers, and any other relevant market participants, in the form of the example table shown below:

	<b>Name of company</b>	<b>Contact details</b>	<b>Relevant contact person</b>
	Both legal and trading names	Postal and physical address, telephone and fax, website	Name, position and contact details including telephone phone, fax, email
<b>Competitors</b>			
<b>Customers</b>			
<b>Suppliers</b>			
<b>Trade associations</b>			
<b>Any other relevant market participants or interested parties</b>			

## PART NINE: CONFIDENTIALITY

- 22 If you wish to request confidentiality for specific information contained in or attached to the notice, please state why you consider the information to be confidential and state the reasons for your request in terms of the criteria set out in the Official Information Act 1982.
- 23 Provide a separate schedule of all confidential information claimed in the application.
- 24 Please provide two copies of the application. One copy must be a confidential version and the other a public version.
- 25 In the confidential version of the application any information for which confidentiality is sought must be highlighted in bold and contained in [square brackets].
- 26 In the public version the confidential information should be removed from within the square brackets, with the brackets remaining, thus [ ].
- 27 A hard copy, and an electronic copy of the confidential version and the public version both in Microsoft Word format and in PDF format, should be sent to the email address: [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz).

*The Commission requires applicants to provide a separate schedule listing all the confidential information so the Commission can process confidentiality requests quickly. For further information on the Commission's confidentiality policy and procedures, please refer to the Streamlined Authorisation Process Guidelines.*

## DECLARATION

THIS NOTICE is given by

\*{individual(s)}/{company}.

\*{the company/I/we} hereby confirm(s) that:

- all information specified by the Commission has been supplied;
- if information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to the applicant(s) which is relevant to the consideration of this application/notice has been supplied; and
- all information supplied is correct as at the date of this application/notice.

\*{the company/I/we} undertake(s) to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated this     day of    20

\*            {Signed by (*name of applicant company*):

\_\_\_\_\_  
Director/Chief Executive Officer/other (specify)}

\*{I am a director/officer of the company and am duly authorised to make this application/notice.}

or

\*{The common seal of (name of applicant company/organisation) was affixed hereto in the presence of:

\_\_\_\_\_  
Director/Authorised signatory }

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**Notes on Declaration**

- This declaration is to be made only by the applicant. It may not be made by a solicitor or other adviser acting on the applicant's behalf.
- The wording in this declaration may not be varied by the applicant.
- If this declaration is not completed, the Commission may decline to register the notice/application.

**CHECKLIST*****Make sure you have enclosed the following:***

- a confidential version of the notice in hard copy, PDF and Microsoft Word;
- a public version of the notice in hard copy, PDF and Microsoft Word;
- a separate schedule of all confidential information claimed in the application;
- any documents referred to in the notice as supporting evidence;
- a signed declaration on the confidential version; and
- payment of \$36,800 (GST inclusive).

## APPENDIX 1

### NOTES TO ASSIST YOU IN YOUR RESPONSES TO QUESTIONS 19 AND 20

#### **Benefits and Detriments – the Commission’s analytical framework**

When considering an authorisation application, the Commission will assess whether the detriments from a reduction in competition is outweighed by the benefit to the public from the practices for which authorisation is sought. The relevant detriments are those which arise in the market or markets where the competition is lessened, while the benefits may arise in those and in any other markets.

A public benefit is any gain, and a detriment is any loss, to the public of New Zealand that would result from the proposed practices. The emphasis is on gains and losses which impact on economic efficiency. Changes in the distribution of income, where one group gains at the expense of another, are generally not included because a change in efficiency is usually not involved.

For benefits to be included in the analysis, there must be a clear nexus between the practices for which the authorisation is sought and the claimed benefits. Please provide relevant information or evidence that demonstrates such a nexus. Please also provide comment on whether there is any less anti-competitive way of achieving the claimed benefits.

#### *Benefits*

The efficiency and other gains which constitute public benefits may include both tangible and intangible benefits.

Tangible benefits, which typically can be measured in monetary terms, may include those derived from:

- economies of scale (where increased output may reduce the average per unit cost of output, usually because fixed costs can be spread over more units);
- economies of scope (where the average per unit cost may reduce because some fixed costs can be spread over a greater range of goods or services);
- better utilisation of existing capacity; and
- cost reductions due to:
  - reduced labour costs,
  - greater specialisation of production,
  - lower working capital, and
  - reduced transaction costs.

Intangible benefits, which can be difficult to measure, may include:

- environmental improvements;
- health improvements; and
- greater innovation in products or processes.

Generally no additional weighting is given to:

- increased employment, unless national employment is increased;
- export earnings as against domestic earnings; and
- redistribution of activity to particular regions.

In accordance with the framework set out above, the applicant should provide information and evidence relevant to its claimed public benefits. The evidence provided may be of a qualitative or quantitative nature.

#### *Detriments*

A firm which does not face the discipline arising from competition is less likely than competitive firms to meet buyers' wants at least cost. Consequently, economic efficiency is reduced if competition is lessened. The firm may be able to reduce output and charge more, leading to a loss of allocative efficiency. The quality of the product may also deteriorate. The firm may be able to afford slackness and waste and still be profitable.

Detriments from a lessening of competition are generally considered in the following categories:

- loss of productive efficiency (from production occurring at more than minimum cost) ;
- loss of product quality;
- loss of allocative efficiency (from prices being set above competitive levels, causing consumers to switch to less preferred alternative goods or services); and
- loss of dynamic efficiency (from a lessening in the incentive to engage in product and process innovation ).

In accordance with the framework set out above, the applicant should provide information and evidence relevant to the detriments set out above. The evidence provided may be of a qualitative or quantitative nature.

#### **The role of qualitative and quantitative evidence**

The Commission has developed its streamlined authorisation process to ensure that straightforward cases are dealt with as quickly as possible. Where benefits appear to be obvious, and it is reasonably clear to the Commission that an application could be assessed on the basis of qualitative evidence, it will do so. The Commission considers that in a streamlined process, it may not always be feasible or necessary to carry out quantitative analysis, given that the critical issues must be limited and discrete (in order to qualify to be considered as a "streamlined" case). Consequently the time and cost involved in carrying out quantitative analysis may not be justified.

The applicant should quantify the claimed benefits and detriments only as far as it is possible to do so and as far as it is necessary to justify its case in the Commission's consideration.

If the applicant relies on a quantified analysis to demonstrate the effects of the practices, that analysis and the supporting data would need to be readily available and easily understood. There might be obvious benefits and few detriments, and if the applicant can provide a reliable and verifiable quantification of benefits and detriments with the application, that would assist the process. However, applicants must consider whether the detriments are also obvious.

The Commission acknowledges that it has a general responsibility to quantify benefits and detriments to the extent that it is feasible, rather than rely solely on qualitative judgment. It will attempt to limit the amount of quantification of benefits and detriments to the minimum necessary for the Commission to make an informed decision on the case.